September 11, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *United States Telecom Ass'n. v. FCC*, 290 F.3d 415 (DC Cir. 2002)

Dear Chairman Powell:

With the decision of the D.C. Circuit to reject the Petitions for Rehearing in *USTA v. FCC*, the Commission faces a critical juncture in its efforts to implement the 1996 Telecommunications Act and ensure the development of robust local competition. To put it most simply, the Commission has a responsibility to seek *certiorari* of the D.C. Circuit's decision. There are at least three persuasive reasons for taking this action. First, the *USTA v. FCC* decision is poorly reasoned and its result is extremely detrimental to the development of competition as set forth in the statute. Second, the *USTA v. FCC* decision is inherently in conflict with the recent Supreme Court decision in *Verizon v. FCC*, which properly deferred to the Commission's expert opinion in supporting its pricing standard for access to unbundled network elements. If the lower court's decision in *USTA v. FCC* is allowed to stand, the Commission's future decisions will have to be based on two conflicting legal standards, harming the integrity and credibility of any future FCC action. Third, the D.C. Circuit decision gravely harms the Commission's rulemaking authority by misapplying the *Chevron* standard and giving virtually no deference to the Commission's reasoned analysis.

Last Thursday, the D.C. Circuit rejected Petitions to Rehearing filed by the Commission and other parties in the *USTA v. FCC* decision. We supported the Commission's Petition, and we strongly believe it eloquently and cogently stated the rationale for rehearing and overturning the May 24, 2002 decision of the panel of the Court deciding the case. In summary, the Commission argued: (1) "the panel's decision is, at a minimum, fundamentally in tension with recent and pertinent Supreme Court authority dealing with closely related substantive requirements of the 1996 Act"; and (2) "the panel's decision . . . can be read to establish, on the basis of a misreading of the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 252 U.S. 366 (1999), an unwarranted restriction on the FCC's implementation of the Act's network element provisions that is, at a minimum, in tension with other provisions of the 1996 Act."

The entire competitive community -- not to mention many Members of Congress, including those who authored the Act -- was heartened by the forcefulness and clarity of

the Commission's call for review and its support of competition. It would be a mistake for the Commission now to reverse course, and, effectively, choose to leave in place a ruling that the Commission properly understands needs to be reconsidered. By seeking *certiorari*, the Commission can give the Supreme Court the opportunity to conclusively resolve the issues raised by that decision, and forestall a new multi-year round of litigation. The Commission will also begin the process that will provide much needed certainty for consumers, providers, and investors.

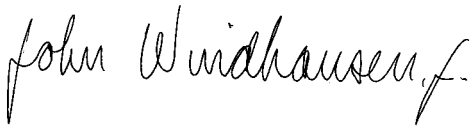
The Bell Companies have argued that plowing ahead with the FCC's UNE Review proceeding as if *USTA v. FCC* were the final word and the law of land will provide the "certainty" needed to deploy new capital investment. Nothing could be farther from reality. Instead, the Commission will be left to formulate rules under conflicting demands imposed by the Supreme Court and the D.C. Circuit, a process that will surely lead to more, not less, uncertainty and continued legal wrangling.

Speaking on behalf of the deeply affected competitive industry, we are certain that timely Supreme Court review of *USTA v. FCC* is the only means to provide true, long-term certainty to the industry, regulators, financiers and consumers. Given the inherent conflict between *USTA* and *Verizon*, any future FCC orders concerning the unbundling provisions of the Act issued prior to clarification by the Supreme Court could lead to chaos in the marketplace. The enforceability of these FCC orders would be extremely problematic, as both sides will claim that each FCC order is inconsistent with one or the other court opinion. The likelihood of inconsistent judicial rulings concerning the legality of these FCC decisions is quite high. The FCC, the industry, and would-be consumers of competitive telecom services would be subjected to several years of additional regulatory and business uncertainty while appeals of the new orders wind their way back to the Supreme Court. In short, the public interest will be much better served if the Supreme Court resolves this conflict nine months from now than 3 or 4 years from now.

Moreover, the deleterious effects of *USTA v. FCC* extend much farther than the interests of common carriers, their financiers, and their customers. The D.C. Circuit's misapplication of *Chevron* and disregard for the institutional prerogatives of the Commission has severely compromised the Commission's ability to make policy determinations relying on its considerable expertise without improper interference from the courts. Again, this stands in stark contrast to the *Verizon v. FCC* decision. Without Supreme Court reversal, the power of the FCC over every area subject to its jurisdiction shall be irreparably harmed.

Mr. Chairman, we call upon you to act promptly to seek *certiorari* so that this case can be heard during the current session of the Court. We stand ready to support you in this endeavor.

Sincerely,



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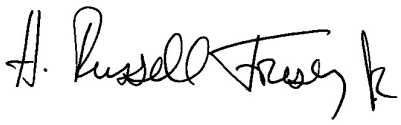

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